SINNAKARUPPI PERIAKARUPPAN

v.

BATHUMALAI KRISHNAN

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[ORIGINATING SUMMONS NO: 24-515-2000]
9 MARCH 2001

FAMILY LAW: *Children - Illegitimate - Application for guardianship by natural mother - Whether must proceed by way of wardship proceedings - Whether Court has jurisdiction under Guardianship of Infants Act 1961 - Courts of Judicature Act 1964, s. 24*

The plaintiff, the natural mother of an illegitimate child, applied under the Guardianship of Infants Act 1961 that she be declared the lawful guardian of the child and be entitled therefore to the care and custody of the child.

A preliminary objection was raised as to the jurisdiction of the court to entertain such an application. The defendant argued that the plaintiff should have proceeded by way of wardship proceedings.

Held:

[1] The court has jurisdiction under s. 24 of the Courts of Judicature Act 1964 to grant custody and guardianship of both legitimate and illegitimate infants, regardless of the Guardianship of Infants Act 1961. The plaintiff did not have to proceed by way of wardship proceedings. In the light of the latest amendments to the Guardianship of Infants Act 1961 which took effect from 1 October 1999, there is less reason to doubt that the Guardianship of Infants Act 1961 in its present form does not apply to illegitimate children.

[Preliminary objection overruled.]

Case(s) referred to:
Balasingam & Paravathy, Infants Kannanmah v. Palani [1970] 2 MLJ 75 ***(refd)***
Khor Liang Keow v. Tee Ming Kook [1996] 2 CLJ 631 ***(refd)***
Low Pak Houng v. Tan Kok Keong [1998] 1 CLJ Supp 357 ***(refd)***
Low Pek Nai v. Koh Chye Guan [1995] 2 CLJ 110 ***(refd)***
Re CT (an infant) [1957] Ch 48 ***(refd)***
Re Miskin Rowter [1963] MLJ 341 ***(refd)***
T v. O [1993] 1 MLJ 168 ***(refd)***
Tam Ley Chian v. Seah Heng Lye [1993] 3 MLJ 696 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 27
Courts of Judicature Act 1964, s. 24
Guardianship of Infants Act 1961, ss. 1(2)(a), 1(3), 10
Guardianship of Infants (Amendment) Act 1999, s. 5

Other source(s) referred to:
Halsbury's Law of England, 4th edn, para 548

For the plaintiff - Chong Yeaw Kiong; M/s M Jayasingam & Co
For the defendant - RR Mahendran; RR Mahendran & Co

Reported by Mariette Peters-Goh

JUDGMENT

Jeffrey Tan J:

In this application by the natural mother (plaintiff) for a declaration that she is the lawful guardian and entitled therefore to the custody and care of her illegitimate infant child (child), a preliminary objection was raised as to the jurisdiction of the court to entertain this application under the Guardianship of Infants Act 1961 (GIA).

According to Mr RR Mahendran for the defendant (natural father), the plaintiff should proceed by way of wardship proceedings. Learned counsel cited the case of *Balasingam & Paravathy, Infants Kannanmah v. Palani* [1970] 2 MLJ 75 where Raja Azlan Shah J. (as HRH then was) held that the court has no jurisdiction to entertain an application by the natural mother for the custody of her illegitimate children. There the court reasoned, (i) that s. 27 of the CLA 1956 provides "In all cases relating to the custody and control of infants, the law to be administered shall be the same as would have been administered in like cases in England as the date of the coming into force of this Ordinance, regard being had to the religion and customs of the parties concerned, unless other provisions is or shall be made by any other written law", (ii) that the law as administered in England as at the date of coming into force of the CLA 1956 was the Guardianship of Infants Act 1886 and 1925, (iii) that *Re CT (an infant)* [1957] Ch 48 decided that English courts have no jurisdiction to make an order granting custody of illegitimate children to the putative father, and, that the terms 'father' and 'mother' do not extend from the *de jure* to the putative, (iv) that therefore, under the law of England in 1956, neither the putative father nor *de facto* mother can make an application to court for an order for custody, (v) that the law as administered in England as at the date of coming into force of the CLA 1956 has not been modified by local

legislation or case law, (vi) that other than s. 1(2)(a), the GIA makes no reference to illegitimate children and so does not apply to illegitimate children. The court in *Balasingam & Paravathy* also held that *Re Miskin Rowter* [1963] MLJ 341 is no authority that the GIA applies or applies not to illegitimate children, and that the remedy is to institute wardship proceedings.

Balasingam & Paravathy was cited in at least three reported decisions, the first of which was *T v. O* [1993] 1 MLJ 168, where the mother applied for an order that she be given custody of and be appointed guardian of her illegitimate infant child, under s. 10 of the GIA 1961, and where a preliminary objection was raised as to the jurisdiction of the court to entertain the application at all, because the infant was illegitimate. Mahadev Shankar J (as he then was) approached that objection from the standpoint of the common law of England and the customary law of Malaysian Chinese, the Married Women and Children (Maintenance) Act 1950, and the Law Reform (Marriage and Divorce) 1976. At p. 175, his Lordship said:

> It must be self-evident by now that *Re CT* is a decision which cannot be applied, across the board, to the Malaysian situation. The question of legitimacy can be a complex one. Of course in a case where illegitimacy is clear, and there never was any question of a marriage either *de facto* or *dejure*, I would respectfully agree with the court in *Re Balasingam and Paravathy*, but only to the extent that the natural mother of an illegitimate child is the person in whom the parental rights and duties will vest exclusively, in the absence of a court order.

In other words, Mahadev Shankar J said he agreed with the court in *Balasingam and Paravathy* that the natural mother of an illegitimate child is the person in whom the parental rights and duties will vest exclusively. But the court in *Balasingam and Paravathy* did not say, with respect, that the natural mother of an illegitimate child is the person in whom the parental rights and duties will vest exclusively. If the qualification is therefore to be ignored, it means that *T v. O* did not agree with *Balasingam and Paravathy* that *Re CT* is applicable. Incidentally, the preliminary objection was over-ruled.

Balasingam & Paravathy was not cited to the court in *Tam Ley Chian v. Seah Heng Lye* [1993] 3 MLJ 696. Anyway, in that case, Selventhiranathan JC (as he then was) plainly said that "s. 24 of the CJA 1964 confers the High Court with jurisdiction to appoint and control guardians of infants which must include illegitimate infants".

Balasingam & Paravathy was next considered in *Low Pek Nai v. Koh Chye Guan* [1995] 2 CLJ 110, where the natural mother applied under the GIA for custody of her illegitimate infant children. Although served, the defendant did not attend at the hearing. There was no objection to the jurisdiction of the

court to grant custody under the GIA. But Mohd Hishamudin J said that he differed with the view in *Balasingam & Paravathy* that the GIA does not apply to illegitimate children. Pointing to s. 1(3), his Lordship held that the GIA refers to illegitimate children, and that the GIA must apply to children generally, legitimate or illegitimate.

However, that was not the view of the court in *Low Pak Houng v. Tan Kok Keong* [1998] 1 CLJ Supp 357. Having set out the background to the GIA, Abdul Aziz J, held, at p. 363:

> section 1(3) [formerly s. 1(2)] does not prove that Parliament intended to change the law from what it had been under the 1935 Ordinance (Guardianship of Infants Ordinance of the Straits Settlements). Certainly it does not prove that under section 5 of the 1961 Act the father of an illegitimate child should be the guardian of the child. For that, express words are necessary.
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> Neither ought the omission of the word 'lawful' from section 6 to be construed as denoting that Parliament intended to effect a change in the law from what it had been under the 1935 Ordinance. As I said, the happy circumstance of the word 'lawful' in section 6 of the Ordinance is an indication that section 5 also intended to refer to the father of a legitimate child. The omission of the word 'lawful' from section 6 in the 1961 Act ought not to be construed as denoting a change of intention. It is not safe to so construe. For such a radical change in the law, there must be express words to give effect to it.
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> I am therefore of the view that section 5 of the 1961 Act is intended to apply to a lawful father and that accordingly the father of an illegitimate cannot claim guardianship under it.

Quite clearly, Abdul Aziz J disagreed with the view that the whole of the GIA applies to illegitimate children. However, his Lordship refrained from stating that the GIA as a whole does not apply to illegitimate children. That, his Lordship made it absolutely clear at p. 363:

> I do not, however, need to come to a determination of my own as to whether the 1961 Act does not apply to illegitimate children ... If s. 6 does not apply to illegitimate children, so that the mother in this case cannot claim guardianship of the child, then the question must be decided according to the common law of England.

But pertinent to the instant preliminary objection, his Lordship further said, at p. 365:

> I would respectfully differ with that decision *(Balasingam & Paravathy*). Section 24(d) of the Courts of Judicature Act 1964 gives the High Court jurisdiction to appoint and control guardians of infants and generally over the person and property of infants. It does not seem to me right that the jurisdiction should be restricted to cases that fall within the 1961 Act.

Meantime, Zulkefly Ahmed Makinudin JC (as he then was) had held, in *Khor Liang Keow v. Tee Ming Kook* [1996] 2 CLJ 631. "adalah jelas Parliamen tidak berhasrat Akta Penjagaan Kanak-Kanak 1961 tersebut terpakai kepada anak tak sah taraf dengan tiada rujukan secara langsung terhadapnya dalam Akta tersebut" ... "s. 24(d) Akta Mahkamah Kehakiman 1964 yang memberi Mahkamah Tinggi bidangkuasa untuk melantik penjaga (guardian) bagi kanak-kanak (infants) yang pada pandangan saya adalah termasuk kanak-kanak tak sah taraf".

Evidently, there is no unanimity of views. Only one case said that the GIA is applicable to illegitimate children. And only one case said that the mother seeking custody of her illegitimate children should do so by way of wardship proceedings. Still, the preponderant view is that the court has jurisdiction under s. 24 of the CJA to grant custody and guardianship of both legitimate or illegitimate infants, regardless of the GIA. It does not appear therefore, that the present plaintiff must proceed by way of wardship proceedings. Indeed, in the light of the latest amendments to the GIA (see Guardianship of Infants (Amendment) Act 1999 effective 1 October 1999), and the substitution of the former s. 5 by an altogether new s. 5 providing for equality of parental rights, there is less reason to doubt that the GIA in present form does not apply to illegitimate children. Presently, the position in England is that "the statutory provisions relating to orders for custody of, and rights of access to, a minor on the application of a mother or father apply in relation to as minor who is illegitimate as they apply in relation to a minor who is legitimate ..." (*Halsbury's Law of England*, 4th edn, para 548). Perhaps it would require further study, but *Low Pek Nai v. Koh Chye Guan* might have fortuitously and correctly stated the law. In any event, s. 24 of the CJA confers jurisdiction on the court to appoint and control guardians of infants and generally over the person and property of infants, a jurisdiction that is not only restricted to cases within the GIA. A wardship proceeding is to protect a minor. Also in wardship proceedings, a guardian may be appointed. This proceeding, call it what you will, would achieve the same objects. It would not serve any purpose to uphold the present objection.

Objection over-ruled. Parties ordered to proceed with the application proper.